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No. 04-892

Supreme Court, U.S.
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In the Supreme Court of the United States

STEVEN A. RHOADS,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE CITY OF CALUMET CITY POLICEMEN'S PENSION FUND,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petitioner has a constitutional right to continue to receive a disability pension when he has been found physically fit to perform his position?

2. Whether the petitioner's discharge from his position as police chief has any bearing on his entitlement to receive a disability pension under Illinois law?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, the Board of Trustees of the Calumet City Police Pension Fund is an administrative agency created under Illinois law with no corporate parent or subsidiary requiring disclosure pursuant to Supreme Court Rule 29.6.

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INTRODUCTION

The respondent, Board of Trustees of the Calumet City Policemen's Pension Fund, (hereinafter the Pension Board), terminated the disability pension of the petitioner, Steven Rhoads, pursuant to the Illinois Pension Code, 40 ILCS 5/3-116. That administrative decision was eventually affirmed by the Illinois Appellate Court. *Rhoads vs. Board of Trustees of the City of Calumet City Policemen's Pension Fund, 348 Ill.App.3d 835, 810 N.E.2d 573 (1st Dist. 2004).* The Illinois Supreme Court denied the petitioner's Petition for Leave to Appeal.

The petitioner's pension revocation was based on and in accordance with Illinois law. There is no constitutional question presented and the Court lacks jurisdiction to grant a petition for writ of certiorari in this case.

STATEMENT OF THE CASE

Steven Rhoads was the Calumet City Chief of Police. (R 523). During an election year, the mayoral challenger made it known that if he were elected Rhoads would be terminated from his position as police chief. The challenger won and on May 13, 1993, the plaintiff was fired. (R 682). He did not contest his discharge. (R 379).

On May 11, 1993, two days prior to his termination, Rhoads filed an application for a duty disability pension with the Pension Board. On January 31, 1995, the Calumet City Police Pension Board granted the plaintiff a not-in-duty disability pension pursuant to 40 ILCS 5/3-114.2 of the Illinois Pension Code. (R 108). Rhoads then filed a complaint for administrative review seeking a line-of-duty disability pension. The Circuit Court reversed the Pension Board's decision denying a line-of-duty disability pension, however, on appeal, this Court affirmed the Pension Board. (R 677-682). In that decision, this court noted that Rhoads left his position as chief of police on May 13, 1993. (R 682).

The Pension Board subsequently was made aware of the fact that Rhoads was gainfully employed as a rodeo clown, working under the name of "Dusty Rhoads". The attorney for the Pension Board hired an investigative firm to undertake video surveillance of Mr. Rhoads. (R 180). The plaintiff was then video- taped at different rodeos throughout the Midwest as a rodeo clown in 1998. (R 179).

On June 22, 1999, the Pension Board had the plaintiff examined by Dr. William C. Malik. In a medical report dated March 6, 2000, Dr. Malik indicated that Rhoads was not disabled as a supervisory law enforcement officer. (R 562, 563). The plaintiff was also examined by Dr. Robert A. Miller at the Pension Board's request who issued a report dated March 29, 2001. That report indicated that Dr. Miller was of the opinion that the plaintiff's knee

condition would not preclude his working in an administrative position in a police department. (R 566, 567). During the administrative hearing, Rhoads introduced no current medical records or reports to rebut the reports of Dr. Malik and Dr. Miller that plaintiff could perform his chief of police duties.

The Pension Board convened an administrative hearing on July 18, 2001. (R 119). At the hearing, the medical reports of Dr. Malik and Dr. Miller were made a part of the administrative record. (R 177). Richard Cyr a private investigator testified as to surveillance conducted on Mr. Rhoads at various rodeos where he was performing as a rodeo clown. (R 180). Also admitted into evidence (Exhibit H), was a videotape filmed by Mr. Cyr showing the activities of Rhoads as a rodeo clown. (R 212). The Pension Board viewed the videotape during the hearing. (R 219). The videotape shows the plaintiff running, jumping, climbing fences, dancing, running from bulls, leaping on and off a barrel, climbing into a barrel, carrying a barrel and being rammed by a bull while crouched inside of the barrel (Board Ex. H, video). At the hearing, the plaintiff did not dispute the fact that he was videotaped performing the above activities. (R 373).

Rhoads also testified that during his tenure as chief of police he supervised approximately seventy-seven police officers. (R 380). He also admitted under cross-examination that he was discharged from his position as chief of police. (R 379). He did not contest his discharge.

The current chief of police, George Vallis testified. He indicated that there were no supervisory or permanent light duty positions available to Mr. Rhoads. (R 331,332). Chief Vallis also stated that the duties of a police chief in Calumet City are primarily managerial, executive and administrative. (R 336). Chief Vallis testified that the police chief in Calumet City serves at the will of the mayor

and there are not discharge protections with the board of fire and police commissioners. (R 334). The municipal ordinance providing that the mayor in Calumet City appoints the police chief was also made a part of the administrative record. (R 463).

On March 15, 2002, the Pension Board issued a written decision terminating the plaintiff's disability pension. (R 106-115). The Board based its decision upon what was shown in the videotape and upon the medical evidence submitted by Dr. Malik and Dr. Miller. (R 111, 112). The Pension Board also found that the chief's position formerly held by Rhoads was administrative in nature and the plaintiff was physically able to perform his former position. (R 114). The administrative decision also concluded that whether or not a current position is available to Rhoads in the police department was not relevant to the issue of whether or not Rhoads was recovered from his disability. (R 115).

In light of its decision, the Pension Board issued an certificate to the municipality pursuant to 40 ILCS 5/3-116 indicating that Steven Rhoads was no longer disabled and able to resume his former duties. (R 117). Since the plaintiff had been lawfully removed from his position, he was not re-employed by the Calumet City Police Department. (R 19).

Plaintiff filed a complaint for administrative review on April 16, 2002 pursuant to the Illinois Administrative Review Law, 735 ILCS 5/3-101 et seq. The administrative record was filed and the case proceeded to a hearing on the merits on April 4, 2003. The trial court issued a written opinion and order on June 27, 2002 (R 712-721). In its opinion, the circuit court held that the Pension Board's decision terminating the plaintiff's disability pension was not against the manifest weight of the evidence. (R 719). However, the lower court held that even though Rhoads

had been fired, he would still be eligible for disability benefits despite his discharge, because his former position of chief of police has not been made available to him. (R721). Thus, according to the circuit court, Rhoads was entitled to continue receiving disability benefits despite his termination. The Pension Board then filed its appeal. (R 722).

On appeal, the circuit court's decision was reversed and the Pension Board's decision was affirmed. *Rhoads vs. The Board of Trustees of the City of Calumet City Policemen's Pension Fund, 348 Ill.App.3d 835, 810 N.E.2d 573 (1st Dist. 2004).*[1] The appellate court held that the Pension Board's decision to terminate Rhoads' disability pension because he was no longer disabled was not against the manifest weight of the evidence. (810 N.E.2d at 580). The court also held that the petitioners' discharge from his position as police chief had no bearing on the Pension Board's termination of his disability pension. (810 N.E.2d at 582).

Petitioner then sought review to the Illinois Supreme Court by filing a petition for leave to appeal. The petition was denied on October 6, 2004.

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[1] The petitioner did not submit any portion of the record below to this Court. The record ("R") is cited frequently in the petition and will be referenced here as well.

REASONS FOR DENYING THE PETITION

A.

There Is No Due Process Question Presented In This Case

It is fundamental that the constitutional guarantees of due process only become operative where there is an actual or threatened impairment or deprivation of life, liberty or property. (U.S. Const., amend, XIV). As this Court recognized in *Board of Regents vs. Roth, 408 U.S.564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556-57 (1972),* "the range of interests protected by procedural due process is not infinite. To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have a legitimate claim or entitlement to it." *Roth, supra, 408 U.S. 564, 577, 92 S.Ct., 2701, 2709, 33 L.Ed.2d 548, 561.* Under *Roth*, property interests are not created by the Constitution, but by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. (408 U.S. 654, 577). See also, *Bishop vs. Wood, 426 U.S. 341, 96 S. Ct., 2074, 48 L.Ed.2d 684 (1976).*

The starting point in any procedural due process analysis is a determination of whether one of the protectable interests are present, for if there is not, no process is due. As in the case of *Polyvend, Inc. vs. Puckorius, 77 Ill.2d 287, 395 N.E.2d 1376 (Ill.1979),* there is no legally protectable property interest in this case that would require the imposition of due process protections. Petitioner's interest to a non-duty disability pension under the Illinois Pension Code depends upon the language of the statute itself. Particularly, the provision which grants the non-duty disability pension and the provision which allows such a pension to be terminated. In this case the disability pension awarded to Steven Rhoads was granted pursuant

to Illinois law. See, *Rhoads vs. Board of Trustees of the City of Calumet City Policemen's Pension Fund, 293 Ill.App.3d 1070, 689 N.E.2d 266 (Ill. 1997).* The disability pension awarded in this case was also properly terminated pursuant to Illinois law. *Rhoads vs. Board of Trustees of the City of Calumet City Policemen's Pension Fund, 348 Ill.App.3d 835, 810 N.E.2d 573 (Ill. 2004).*

The Illinois Pension Codes provisions dealing with the granting and termination of a not-in-duty disability pension to police officers such as Rhoads, provide as follows:

> **Disability pension – Not on duty**. A police officer who become disabled as a result of any cause other than the performance of an act of duty, and who is found to be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service in the police department, shall be entitled to a disability pension of 50% of the salary attached to the officer's rank on the police force at the date of suspension of duty or retirement. 40 ILCS 5/3-114.2

> **Examination and emergency service**. A police officer whose duty is suspended because of disability may be summoned to appear before the board, and to submit to an examination to determine fitness for duty. The officer shall abide by the board's decision. If a police officer retired for disability, except one who voluntarily retires after 20 years' service, is found upon medical examination to have recovered from disability, the board shall certify to the chief of police that the member is no longer disabled and is able to resume the duties of his or her position. In case of emergency, a disabled police officer may be assigned to and shall perform such duty without

> right to compensation as the chief of police or chief officer of the municipality may direct. 40 ILCS 5/3-116.

The Application of these provisions in any particular instance calls for case-specific factual determinations by the pension boards and the reviewing courts.

As the appellate court pointed out, the findings and conclusions of an administrative agency on questions of fact are deemed *prima facie* true and correct and will not be disturbed unless they are against the manifest weight of the evidence. *Rhoads II, supra, 776 N.E.2d 840, 849.* See also, *Trettenero vs. Aurora Police Pension Fund, 333 Ill.App.3d 792, 801, 776 N.E.2d 840, 849 (Ill. 2002).* Under Illinois law, a police officer's disability pension is contingent on his continued disability and if he recovers from the disability, the Board may revoke his disability pension. *Martino vs. Police Pension Board of the City of Des Plaines, 331 Ill.App.3d 975, 772 N.E.2d 289 (Ill.2002).* In this case the Illinois Appellate Court found that the Pension Board's determination that Rhoads had recovered from his disability was not against the manifest weight of the evidence. *Rhoads II, supra, 810 N.E.2d at 580.* The medical evidence obtained by the Pension Board indicated that Rhoads could function in his former position as police chief and Rhoads presented no contrary medical evidence to indicate that he was unable to perform the duties as a police chief. In addition, the Board relied upon a videotape of Rhoads performing as a rodeo clown where the tape showed him running, jumping, climbing fences, dancing, leaping on and off a barrel, carrying the barrel and being rammed by a bull while crouched inside the barrel, *Rhoads II, supra, 810 N.E.2d at 579.* Thus from a factual standpoint, there was abundant evidence to terminate the petitioner's disability pension. Illinois law is clear that if there is evidence in the record to support a pension board's

revocation of a disability pension, the administrative decision must be affirmed. See, *Antonelli vs. Board of Trustees of the Hillside Police Pension Board, 287 Ill.App.3d 348, 678 N.E.2d 773 (Ill. 1997).*

Petitioner claims that his due process rights were somehow violated because even though he was found medically fit to perform his job duties as police chief, he was disabled from full duty employment as a police officer. Pet. at 10. These facts do not amount to a deprivation of due process and petitioner's assertion to the contrary is flawed. Rhoads was not a police officer, he was police chief. (R 379, 380). Thus, it is irrelevant that he could not perform patrol officer functions, because he was not a patrol officer. The duties of a police chief are established by municipal ordinance and were made a part of the administrative record. (R 463).

Petitioner's argument that his inability to function as a police officer somehow impacts upon his fitness as a police chief was addressed and soundly rejected in the appellate court opinion.

> Rhoads argues that he continues to be disabled and could not return to his position as police chief. He cites Vallis' testimony that the mission statement of the police department states that the police chief must be able to function as a police officer and Dr. Miller's and Dr. Malik's statements that Rhoads could not return to full duty as a police officer as a result of his disability. However, the Board cited the City of Calumet City's ordinance, which was offered into evidence by Rhoads, describing the duties of the chief of police. See Calumet City Code §20-6. All the duties outlined in this ordinance are purely supervisory and do not require any physical demands of the police chief or that the chief be able to function as a patrol officer. Accordingly, we

> reject Rhoads' argument. Therefore, we find that the Board's factual findings were adequately supported by the evidence and its decision to terminate Rhoads' disability pension because he was no longer disabled was not against the manifest weight of the evidence.
>
> *[Rhoads II, 810 N.E.2d at 580]*

The analysis makes perfect sense. Rhoads' pension was terminated because the medical evidence and facts indicated that he could perform his former position of chief of police.

Petitioner cites no statutory provision or case law that prohibits the revocation of a police chief's disability pension unless he cannot perform the functions of a patrol officer. No such statute or case law exists in Illinois. The cases cited by Rhoads in support of this far-fetched proposition, (Pet. at 11), actually support the Pension Board's determination See eg. *Martino vs. Police Pension Board of the City of Des Plaines, supra, Antonelli vs. Board of Trustees of the Hillside Police Pension Board, supra.* No constitutional deprivation occurs when the recipient's disability pension is terminated because he is found to be recovered from disability and able to perform his previous position.

B.

The Fact That Rhoads Could Not Be Returned To His Previous Position Of Police Chief Does Not Entitle Him To a Continuing Disability Pension Upon Recovery

The second facet of the petitioner's argument is that even if he has recovered from disability, he has some sort of continuing constitutional entitlement to a disability pension because he cannot be returned to his previous position. (Pet. at 12). Once again, the starting point in any such contention begins with the language of the statute itself. Section 3-116 of the Illinois Pension Code, 40 ILCS 5/3-116 provides:

> Examination and emergency service. A police officer whose duty is suspended because of disability may be summoned to appear before the board, and to submit to an examination to determine fitness for duty. The officer shall abide by the board's decision. If a police officer retired for disability, except one who voluntarily retires after 20 years' service, is found upon medical examination to have recovered from disability, the board shall certify to the chief of police that the member is no longer disabled and is able to resume the duties of his or her position. In case of emergency, a disabled police officer may be assigned to and shall perform such duty without right to compensation as the chief of police or chief officer of the municipality may direct. 40 ILCS 5/3-116.

Nowhere in the above provision is there any mention of the right to continue to receive a disability pension where there is recovery from disability, simply because the recipient cannot be returned to his previous position.

Petitioner's assertion was clearly rejected by the appellate court.

> Under section 3-116 of the Code, as set forth above, the Board has the authority to terminate an officer's disability pension if the officer is found, upon medical examination, to have recovered from his disability. In that situation, section3-116 provides that the Board will certify to the chief of police that the member is no longer disabled and is able to resume the duties of his position. 40 ILCS 5/3-116 (West 2000). The statute does not require that a position be available for the officer upon the termination of his disability pension. Additionally, police officers on disability pensions are not subject to recall to active duty upon recovery from their disability. *Greenan v. Board of Trustees of the Police Pension Fund, 213 Ill.App.3d 179, 185, 158 Ill.Dec. 12, 573 N.E.2d 825, 829 (1991).* The Board's certification under section 3-116 "does not require the pensioner be returned to duty, nor does it provide an absolute right to his or her old position." *Greenan, 213 Ill.App.3d at 185, 158 Ill.Dec. 12, 573 N.E.2d at 829.* Additionally, the *Greenan* court found that even though a police officer's resignation from the police department did not bar his right to a disability pension, that officer would not be entitled to a pension if he was not disabled. *Greenan, 213 Ill.App.3d at 187, 158 Ill.Dec. 12, 573 N.E.2d at 830.*
>
> *[Rhoads II, 810 N.E.2d at 580]*

The *Rhoads* court went on to state that the petitioner held an appointive position from which he could be removed at any time. He was thus validly discharged and he never contested his discharge. *Rhoads II at 810 N.E.2d 581.*

Petitioner argues that there was no light duty position available to him and that somehow this makes a difference in his case. (Pet. at 13). The existence or non-existence of

a light duty position has absolutely no bearing on this case. Rhoads was legally terminated from his position in the Calumet City Police Department and he did not contest his termination (R 379, 682). Given these facts, the issue of light duty is irrelevant.

1. There Is No Conflict Among The State Court Cases.

In support of his argument that he is entitled to either reinstatement or a continuing disability pension, Rhoads cites a number of Illinois Cases on pages 13 through 25 of his petition. None of these cases are in conflict with the courts' decision here and all of them are readily distinguishable as the appellate court pointed out in its opinion. *Rhoads, II at 810 N.E.2d at 581-582.*

The cases petitioner relies on: *Thurow vs. Police Pension Board of the Village of Fox Lake, 180 Ill.App.3d 683, 536 N.E.2d 155 (Ill. 1989); Iwanski vs. Streamwood Police Pension Board, 232 Ill.App.3d 180, 596 N.E.2d 691 (Ill.1992); Peterson vs. Board of Trustees of Firemen's Pension Fund of the City of Des Plaines, 54 Ill.2d 260, 296 N.E.2d 721 (Ill. 1973); Danko vs. Board of Trustees of the Harvey Pension Board, 240 Ill.App.3d 633, 608 N.E.2d 333 (Ill.1992)* and *Terrano vs. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago, 315 Ill.App.3d 270, 733 N.E.2d 905 (Ill.2000),* all involved the award of a disability pension in the first instance, not the revocation of a pension previously granted. In addition, none of these cases dealt with the unique factual situation where the pension recipient was discharged from an appointed position. None of these cases even remotely support the petitioner's claim that he was entitled to a light-duty position in the police department despite his termination.

In *Thurow vs. Police Pension Board of the Village of Fox Lake, 180 Ill.App.3d683, 536 N.E.2d 155 (2nd Dist. 1989),* a disability pension was denied because the pension board determined that the applicant could perform light-duty. Since there was no evidence presented at the hearing to indicate the availability of any light-duty positions in that police department, the case was reversed and remanded to determine if a light-duty position was in fact available. *Thurow supra, 536 at 159, 160.*

In a similar fashion, *Danko vs. Board of Trustees of the City of Harvey Police Pension Board, 240 Ill.App.3d 633, 608 N.E.2d 333 (1st Dist. 1992),* also dealt with the denial of a duty disability pension because of the alleged existence of a light duty position. In that case, the denial of a disability pension was reversed because there was no established light duty position available and the position made available to Danko was a hoax created to deny him a pension. (608 N.E.2d at 340).

Peterson vs. Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines, 54 Ill. 2d 260, 296 N.E.2d 721 (Ill. 1973) also dealt with a disability pension application and the existence of a light duty position. Once again the firefighter applicant had not been terminated.

Terrano vs. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, 315 Ill.App.3d 270, 733 N.E.2d 905 (1st Dist. 2000), again dealt with the initial denial of a disability pension and the absence of any evidence as to a light duty position. Since no evidence was produced that a light duty position was even offered to Terrano, he was awarded a disability pension. None of these issues are present in this case.

Iwanski vs. Streamwood Police Pension Board, 315 Ill.App.3d 270, 733 N.E.2d 905 (1st Dist. 1992), dealt with the denial of a disability pension to a police officer who

was discharged after he applied for a disability pension. 594 N.E.2d at 694. The reviewing court held that Iwanski's discharge did not preclude him from receiving a disability pension. 594 N.E.2d at 695. Here, the Pension Board's initial decision granting Rhoads a disability pension is in complete conformance with the holding in *Iwanski*. Rhoads filed his disability pension application on May 11, 1993 and was discharged two days later. Despite the discharge, Rhoads was granted a not-on-duty disability pension on January 31, 1995, well after his discharge. See, *Rhoads vs. Board of Trustees of the Calumet City Policemen's Pension Fund, 293 Ill.App.3d 1070, 589 N.E.2d 266, 268 (Ill. 1997).*

All of these cases have no bearing on the issues presented here. This was a fact-specific case dealing with the question of whether there was sufficient evidence in the record to support the revocation of the petitioner's disability pension. The appellate court determined that there was ample evidence to support the Pension Board's determination and the supreme court declined to review that decision.

CONCLUSION

For the reasons stated above, the Petition for A Writ of Certiorari should be denied.

Respectfully Submitted,

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